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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-936

HON KEUNG KUNG,

Petitioner,

v.

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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HON KEUNG KUNG,

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DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Hon Keung Kung, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 18, 1973.

OPINION BELOW

The opinion of the Court of Appeals was ordered not to be reported and appears in the appendix hereto. The opinion of the United States District Court for the Eastern District of Missouri is reported at 356 F. Supp. 571 (E.D. Mo. 1973).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 18, 1973. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether in the light of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Immigration and Naturalization Service may conduct a warrantless search of a hotel in the absence of exigent or emergency circumstances, or a situation requiring forcible detention for a temporary period because of a life-endangering crime of violence.

2. Whether racial appearance alone is a permissible basis for belief that a person is an alien for the purpose of interrogation pursuant to 8 U.S.C. 1357(a)(1).

3. Whether 8 U.S.C. 1362 affords an alien the right to counsel during a custodial interrogation.

4. Whether *Miranda v. Arizona* requires that an alien be afforded the right to counsel during an accusatory interrogation where the alien has been deprived of his freedom of action.

5. Whether 8 U.S.C. 1357(a)(2) permits an arrest of an alien illegally in the United States without a showing that the alien is "likely to escape" apart from the sole fact of his violation of the immigration law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable

searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly, describing the place to be searched and the persons or things to be seized."

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides in part:

"Sec. 287.(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]" (emphasis added)

Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362 provides as follows:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being

represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

STATEMENT OF THE CASE

The Immigration and Naturalization Service (hereafter referred to as INS) received information at its offices in St. Louis that two Chinese alien crewmen named Yeo Shiann Wang and Hai Ming Chang might be found in St. Louis living with one Sandy Lee. On January 14, 1969, two INS officers went to the MacArthur Hotel, where they knew Sandy Lee to be living, in search of Wang and Chang, with their photographs but without search warrants. (R. 12)[1]

At the hotel, the room clerk directed them to the room in which Lee was living. They did not find Wang or Chang; instead they found the petitioner, Hon Keung Kung. (R. 13, 14)

The circumstances of their discovery of the petitioner are as follows:

When the officers reached room 1407, which was occupied by Lee, the petitioner, and another, they found the door open to a width of approximately 3-4 inches. They knocked. Lee opened the door. While inquiring about Wang and Chang, one of the INS officers observed the petitioner lying on one of three beds in the room. As the officer testified in the subsequent deportation proceedings:

"He was laying (sic) in the first bed; he didn't have anything on but a T-shirt and a pair of shorts and he

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[1] The abbreviation "R" denotes the deportation proceedings, which are part of the record on file with the court.

was awake, his eyes were open and he was watching Mr. Lee and myself talk." (R. 15)

Based on nothing more than this observation, the INS officer questioned the petitioner regarding his immigration status in the United States. As he explained during the deportation proceedings:

"As an investigator of the Immigration Service, I am required to and expected to be able to recognize people by their nationality, and it is my job to locate people such as [petitioner], who have violated the United States immigration laws. Since I was standing in the room, it was very evident that there was (sic) three Chinese gentlemen in the room. I would have felt that I was shirking my duty if I did not ask all of them if they had papers to be in the United States."

"In other words, we might assume from your response that the [petitioner's] appearance being that of an oriental, was such as to lead you to conclude that he would be the type of person that you should question in the course of your duties, if you had any reason to suspect he might be illegally in the United States."

"Yes Sir." (R. 35)

* * * * *

"You said that you saw three people in the hotel room who were Chinese and their appearance made you believe that they might be in the United States illegally, is that correct? I don't mean to misunderstand your answer."

"Their appearance made me believe it was possible that they could be here illegally."

"What about their appearance made you believe this."

"The simple reason the man is oriental." (R. 36)

The officer then turned to petitioner and asked him:

> "Do you have any immigration papers to be in the United States? When I asked that question, Mr. Lee turned and said something to the subject in Chinese, the subject said something to Mr. Lee in Chinese, and Mr. Lee turned around and said, 'No, he doesn't.' Then I asked Mr. Lee, 'How did he enter the United States, as a crewman?' Mr. Lee said, 'Yes.' I said, 'Approximately how long has he been here?' He said, 'One year.' I then told Mr. Lee to tell him to get out of bed and get dressed and to pack his clothing because he was going to have to come to the Immigration office with us." (R. 15)

After petitioner had finished dressing, he gave the INS officer a Crewman's Landing Permit, Form I-95. The officer testified:

> "No one asked him to do anything. He just walked up, pulled it out of his shirt pocket and handed it to me." (R. 26)

Petitioner testified to the contrary:

> "The person from Immigration showed me a sample and asked me whether I had a paper like that and I gave it to him." (R. 85)

Petitioner had not been told of his right to refuse to answer any questions:

> "Did you tell Mr. Lee or the respondent that, in addition to being an officer of the Immigration and Naturalization Service, they did not have to answer any questions which you might ask of them or if they did answer any of the questions, that the answers which they gave could be used against them."

"No Sir, I did not."

"Isn't that part of the procedure which the officers of the Immigration and Naturalization Service are obliged to use when they take statements from person who they believe to be illegally in the United States?"

"Yes Sir, we do." (R. 27)

Thereafter, petitioner was taken down to the offices of the INS in St. Louis where for the first time he was given the *Miranda* warnings and required to sign a Form I-214 as evidence of this fact. (R. 56)

Over objection, the Crewman's Landing Permit was introduced into evidence at the deportation proceeding. Other documents, located in the files of INS as a result of obtaining the Crewman's Landing Permit, were also introduced into evidence at the deportation proceeding over objection. (R. 26, 58-59)

On the basis of these documents, the Special Inquiry Officer found that the petitioner is a native and citizen of China, had been admitted to the United States as a crewman on February 3, 1968, and had remained longer than the period for which he had been admitted. Petitioner was ordered deported. The BIA dismissed petitioner's appeal on May 16, 1972.

The petitioner challenged the order of deportation by filing a petition for a writ of habeas corpus in the District Court below. He raised the following grounds:

(1) That the search of his room and his seizure were in violation of the protections of the Fourth Amendment against "unreasonable searches and seizures",

(2) That the statutory authority vested in INS officers to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" does not authorize a custodial-in terroram questioning of

a person solely upon the basis that a person has an "oriental" appearance,

(3) That the petitioner was deprived of effective right to counsel since he was not advised of such right, despite the fact that the circumstances of his questioning were "custodial" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966), and despite the assurances of §292 of the Immigration and Nationality Act, 8 U.S.C. 1362, which affords aliens in deportation proceedings of the right to counsel.

(4) That the petitioner's arrest was in violation of the Fourth Amendment and not warranted by 8 U.S.C. 1357(a)(2) in that the immigration officer had no basis for believing that the petitioner was "likely to escape before a warrant [could] be obtained for his arrest . . ."

The District Court denied the petition for a writ of habeas corpus. It held that "race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status"; that the provision of the Immigration and Nationality Act which requires the right to counsel is limited to that right in "proceedings before a special inquiry officer or in any appeal proceedings"; that the right derived from *Miranda* does not apply here because the petitioner "was in familiar surroundings, had not been taken into custody, or otherwise deprived of his freedom of action in any significant way"; and that the petitioner's search and seizure were not in violation of the Fourth Amendment since the arresting officer had "reason to believe that the petitioner was in the United States in violation of law" and "reasonably concluded that petitioner was likely to escape before an arrest warrant could be obtained . . ." *Hon Keung Kung v. District Director*, 356 F. Supp. 571, 575-576 (E.D. Mo. 1973)

On appeal, the Eighth Circuit affirmed, relying upon the opinion entered by the District Court. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

1. The case here involves once again the use by the Immigration and Naturalization Service of warrantless administrative searches for ferreting persons who are believed to be aliens illegally in the United States. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Campos-Serrano*, 404 U.S. 293 (1971); *Abel v. United States*, 362 U.S. 217 (1959); *Cheung Tin Wong v. Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied* 404 U.S. 864 (1972); *Yam Sang Kwai v. Immigration and Naturalization Service*, 411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877 (1969).

In *Almeida-Sanchez*, this Court addressed itself to the authority of the Immigration and Naturalization Service to conduct warrantless searches of automobiles. In *Campos-Serrano*, this Court granted certiorari on the question of the authority of the Immigration and Naturalization Service to conduct "area control searches," without warrants (See Brief for the United States, *United States v. Campos-Serrano*, No. 1028, October Term, 1970, p. 3) but instead decided the case upon another ground. 404 U.S. at 295.

The procedures involved here have been characterized by Mr. Justice Brennan in his dissenting opinion in *Abel v. United States*, 362 U.S. at 252 (1959):

> "These arrest procedures . . . differ as night from day the processes of an arrest for crime. When the power to make a broad, warrantless search is added to them, we create a complete concentration of power

> in executive offices over the person and effects of the individual. We completely remove any independent control over the powers of executive officers to make searches. They may take any man they think to be a deportable alien into their own custody, hold them without arraignment or bond, and having been careful to apprehend him at home, make a search generally through his premises."

The questioning, search, and seizure of the petitioner while lying in his bed in his hotel room raises fundamental questions regarding the protections afforded by the Fourth Amendment.

This Court has in the past limited its approval of warrantless searches to very exceptional circumstances. See *McDonald v. United States*, 335 U.S. 451 (1948), suggesting that there must be gravity in the offense involving "crimes of violence which endanger life and security", and *Terry v. Ohio*, 392 U.S. 1, 25-27 (1968); *Warden v. Hayden*, 387 U.S. 294, 298 (1967), involving "exigent circumstances" such as "hot pursuit"; and *Camara v. Municipal Court*, 387 U.S. 523, 539 (1966), involving "emergency situations" compelling "prompt inspections".

None of these decisions suggests any authority on the part of the Immigration and Naturalization Service, conducting a routine search for aliens whose identities and likenesses are known, to search their living quarters, although in hotel rooms, for their presence or a fishing expedition for the detection of other aliens. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

The absence of any justification for conducting a warrantless search of the petitioner's hotel is underscored by the decision by this Court in *Almeida-Sanchez*. If the Immigration and Naturalization Service has no authority

to conduct warrantless searches of automobiles "within a reasonable distance from any external boundary of the United States" as provided by the terms of 8 U.S.C. 1357(a)(3), can there be any question as to its authority to conduct a warrantless search of a dwelling?

2. A further interrelated question posed by the decision below arises from the provision of §287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(1), which authorizes INS officers "without warrant to interrogate any . . . person believed to be an alien as to his right to be or to remain in the United States".

The record here establishes that the petitioner was questioned[2] for "the simple reason the man is oriental" (R. 36).

The Court below, blinking at the facts that the arresting officer testified that the sole reason for his questioning was that the petitioner was "oriental" and that the Board of Immigration Appeals, whose findings of fact when supported by reasonable, substantial and probative evidence are conclusive, 8 U.S.C. 1105(a)(a)(4), found that the questioning was based upon this one fact,

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[2] The evidence in the administrative proceeding establishes that two officers of the Immigration and Naturalization Service went to the 14th floor of the hotel. One officer stood at the entry to the room in question; another guarded the door of an adjacent room. The INS officer testified that he was required to "recognize people by their nationality" and that it was his "job to locate people such as (petitioner), who have violated the United States immigration laws" and that he would have felt that he was shirking (his) duty if (he) did not ask all of them if they had papers to be in the United States". In this circumstance, it seems clear that the petitioner would not have been allowed to leave the room without responding to the questions of the INS officer. (R. 35)

sought additional circumstances, presumably nonracial, to justify a belief that the petitioner may be an alien.[3]

Whether a single factor or one of several, it is clear that the decision of the Court below permits "oriental appearance" to be utilized as a "reasonable suspicion" for believing that a person is an alien.

The Court below justified its position upon the basis of "common sense" and upon similar holdings by other Circuits, like the District of Columbia Circuit in *Cheung Tin Wong v. Immigration and Naturalization Service*, 468 F.2d 1123, which stated that "we need not be so naive as to blink at the reality of the fact that many of the aliens who illegally enter the United States each year are oriental seamen . . ." (at ___).

The latter ground would appear to be foreclosed by this Court's decision in *Almeida-Sanchez* which indicated that this Court was not moved by statistics in greater numbers, involving the illegal entry of Mexican aliens into the Southwest areas of the United States, to sacrifice the Fourth Amendment or to construe the third subsection of 8 U.S.C. 1357 to permit warrantless searches of automobiles.

Whatever "common sense" may lead courts to believe that "Oriental" appearance, anymore than "Nordic", "Gallic", "Semitic", or "African" appearance, is a basis for

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[3] The other factors were that "the oriental aliens" sought by the INS, Wang and Chang, were in an adjacent room; that Lee had previously lived in the adjacent room but had moved to the room then under observation, and that the petitioner failed, "to answer in English the officer's first question" (sic) which "strongly suggested that petitioner did not speak English and was therefore an alien." *Hon Keung Kung v. District Director*, 356 F. Supp. at 574.

believing that a person is an alien, this approach makes a distinction between those persons who appear to be "Oriental" and persons who have other racial characteristics.

The settled holdings of this Court suggest that racial distinctions are not only invidious but are by now unconstitutional when invoked for discriminatory purposes. See *Truax v. Raich*, 239 U.S. 32, 41 (1915); *Hirabayashi v. United States*, 320 U.S. 81, 100; *Korematsu v. United States*, 323 U.S. 214, 217 (1944).

The effect of the holding below is plainly to authorize INS officers to subject persons in the United States of Asian ancestry to discriminatory treatment compared to persons of European or African origins. The prejudice against Chinese and other Asians has been embeded deep in our society. See The Chinese Exclusion Case, 130 U.S. 581 (1889), and *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (Mr. Justice Douglas, dissenting). Unless the decision below is reversed, there will be continuing prejudicial treatment by INS officers of those persons in America who are of Asian ancestry.

This question is of overriding importance to millions of persons in the United States, citizens, lawful permanent resident aliens, and illegal aliens alike, since the decision below, together with recent holdings in the District of Columbia Circuit, authorizes on-the-street, and now, in-the-hotel-room questioning of persons who here appear to be "Oriental" but in another time and place may appear to be of some ethnic origin other than "American".

3. A third question affecting the rights of aliens before the Immigration and Naturalization Service involves the right to counsel.

Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, affords the right to counsel in any exclusion

or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General.

The Court below held that the section did not apply to "initial questioning" of the petitioner by investigative officers of the Immigration and Naturalization Service.

This holding of the Court is contrary to the thrust of repeated holdings of this Court which have expanded and implemented the right to counsel in all encounters with police and investigative officers of the government. See *United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California,* 388 U.S. 263 (1967), and *Miranda v. Arizona,* 384 U.S. 436 (1966).

To limit the right to counsel solely to formal proceedings, after the derogatory evidence has been obtained, is effectively to deny the assistance of counsel. A substantial question is raised whether the right to counsel afforded by statute in the context of the constitutional right to counsel should be so limited.

The grant of certiorari in *United States v. Campos-Serrano,* 404 U.S. 273 (1971), where the issue was not decided, suggests a further reason for review of the similar question here. This Court has not retreated from its position that *Miranda* warnings must be given whenever an encounter between a law enforcement official and a suspect becomes a custodial interrogation.

The Immigration and Naturalization Service has adopted the standards of *Miranda* in interrogating persons who have been formally taken into custody and are being questioned at offices of the Immigration and Naturalization Service during the investigative stages of deportation. See 1. Gordon and Rosenfeld, Immigration Law and Procedure (Rev. Ed.) §5.2b (1973); See also Memorandum for Respondent in Opposition to Granting

Petition for Writ of Certiorari, *Ah Chiu Pang v. Immigration and Naturalization Service,* 368 F.2d 637 (3rd Cir. 1966), cert. denied 386 U.S. 137 (1967).

However, the practice of INS officers, as reflected on the record here, provides only a sham protection to the rights of persons who are being interrogated. The effective questioning is invariably conducted on-the-street, in place of employment, in dwellings, and in other initial face-to-face encounters between the enforcement officers of the INS and the suspected alien. See *Cheung Tin Wong v. Immigration and Naturalization Service,* 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau v. Immigration and Naturalization Service,* 445 F.2d 217 (D.C. Cir. 1971); *Yam Sang Kwai v. Immigration and Naturalization Service,* 411 F.2d 683 (D.C. Cir. 1969), cert. denied, 396 U.S. 877 (1969).

Especially where the Congress has explicitly established the right to counsel in deportation and exclusion proceedings it seems inappropriate to interpret the constitutional right to counsel with such restricted and narrow ambit. Compare Cf. *Sung v. McGrath,* 339 U.S. 33, 50 (1950), which construed the statute governing deportation proceedings so as to provide for the separation of hearing and prosecuting officers.

4. Apart from these broader considerations, the decision below warrants review by this Court to determine whether the in-the-hotel room questioning of the petitioner was a deprivation of "his freedom of action in any significant way" within the meaning of *Miranda.* The question is not of casual importance since it involves the extent of the right of privacy afforded by the Fourth Amendment.

A further question is posed by the disagreement of the Eighth and Seventh Circuits regarding the rights

which attach to persons when their questioning reaches an "accusatory stage". To the extent that there is a conflict in the approaches of the two circuits, this issue should be resolved by this Court. Cf. *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969).

Similarly the holding of the court below that the petitioner consented to the questioning seems plainly in conflict with the holdings of this Court in dealing with the voluntary waivers of constitutional rights. See *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Glasser v. United States*, 315 U.S. 60 (1942), and *Boykins v. Alabama*, 395 U.S. 238 (1969), and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

5. The statutory basis for the petitioner's arrest presents a further substantial question warranting review by this Court. When the INS officer ordered petitioner to get out of bed and to get dressed, to take him to the Immigration office, their legal relation changed significantly. At that point petitioner was under formal arrest. *Henry v. United States*, 361 U.S. 98 (1959).

This arrest, without a warrant, did not comply with the second condition of 8 U.S.C. 1357(a)(2) which requires *both* a reason to believe a violation of the immigration laws *and* a likelihood of escape.

Although the statute is written in the conjunctive, the Board of Immigration Appeals and the Court below ignored this language in accepting the conclusion that the petitioner's violation of the immigration law established that he was likely to escape before a warrant could be obtained. Since a warrantless search is an exception to the accepted rule that a warrant is constitutionally required, such elliptical construction of the language of 1357(a)(2) seems inappropriate. Cf. *Henry v. United States*, supra. A strict construction of the statute is

required to condition the authority of Immigration officers to arrest without a warrant, ". . . at a minimum, upon a reasonable determination that the alien is likely to escape before an arrest warrant can be obtained . . ." *United States v. Mason*, 344 F.2d 673, 680 (2nd Cir., 1965). No circumstances are suggested here that could have caused the officer to believe that petitioner would escape. No showing was made that he was in flight, that he was not employed, that he had not been a stable resident of St. Louis, or that he had a false identity. He did nothing before his arrest except lie in his bed and answer questions. Whether an arrest in these circumstances comports with Section 1357(a)(2) should be considered by this Court.

CONCLUSION

For the reasons urged above, petitioner urges that a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Eighth Circuit.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73-1209

HON KEUNG KUNG, Appellant, v. DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: September 14, 1973
Filed: September 18, 1973

Before MATTHES, Senior Circuit Judge, LAY and ROSS, Circuit Judges.

PER CURIAM.

This is an appeal from a judgment of the District Court denying a writ of habeas corpus to Hon Keung Kung, who had earlier been ordered deported by the Immigration and Naturalization Service. We affirm the denial of the writ.

Kung claimed in the District Court and in this appeal that he was improperly questioned by Immigration officials on the basis of his oriental appearance; that this allegedly illegal questioning resulted in an illegal arrest; that a document handed by Kung to the officials was illegally taken from him after arrest and prior to the giving of Miranda warnings; and that the documents were

therefore the fruits of an unconstitutional detention and should not have been received in evidence at the Immigration hearing.

We have examined each of these claims and have found that they are without merit and that they were correctly disposed of in a well-reasoned memorandum and order by Judge William H. Webster dated February 28, 1973. The judgment is affirmed on the basis of that memorandum and order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HON KEUNG KUNG, Petitioner, vs. DISTRICT DIRECTOR Immigration and Naturalization Service, Respondent.	)	Cause No. 72 C 770(3)

MEMORANDUM AND ORDER

This matter is before the court on a petition for a writ of habeas corpus to review a final order of deportation entered pursuant to 8 U.S.C. §1251(a)(2). See 8 U.S.C. §1252(b).

Title 8, U.S.C. §1105a(a)(9) provides:

"any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

Petitioner is "in custody" under a bond conditioned on his delivery to the custody of the District Director of the Immigration and Naturalization Service in St. Louis, Missouri. *United States v. Esperdy*, 296 F. Supp. 726 (S.D.N.Y. 1969); *Varga v. Rosenberg*, 237 F. Supp. 282, 285 (S.D. Calif. 1964). Cf. *Jones v. Cunningham*, 371 U.S. 236 (1963); *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Pizarro v. District Director, U.S. Immigration & Naturalization Service*, 415 F.2d 481 n. 1 (9th Cir. 1969).

The standard of review to be applied here is as follows:

> ". . . The petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;" 8 U.S.C. § 1105a(a)(4).

The facts, as found by the Board of Immigration Appeals ("the Board"), are substantially as follows: On January 14, 1969, two Immigration and Naturalization Service (I & N S) officers went to the MacArthur Hotel in St. Louis, Missouri, to speak to one Sandy Lee. The officers believed that Lee could furnish them with information concerning the whereabouts of two deserting Chinese crewmen named Wang and Chang. The officers approached Lee's room (#1407) and found the door ajar approximately three or four inches. One of the officers knocked on the door and Lee opened it wide. The officer identified himself and informed Lee of his mission. Lee said that the aliens the officers were looking for were in an adjacent room (#1409). One of the officers, while still standing in the doorway, observed the petitioner lying in a bed near the door. The officer noticed that petitioner was Oriental and decided to question him concerning his

immigration status. The officer's testimony as to what then transpired, although not set out in full in the Board's opinion, was as follows:

> "So after I decided that Mr. Chang and Mr. Wang were in the other room, I turned to this gentleman and asked him directly. I said, '*Do you have any immigration papers to be in the United States?*' When I asked that question, Mr. Lee turned and said something to the subject in Chinese, the subject said something to Mr. Lee in Chinese, and Mr. Lee turned around and said, '*No, he doesn't.*' Then I asked Mr. Lee, '*How did he enter the United States, as a crewman?*' Mr. Lee said, '*Yes.*' I said, '*Approximately how long has he been here?*' He said, '*One year.*' I then told Mr. Lee to tell him to get out of bed and get dressed and to pack his clothing because he was going to have to come to the Immigration Office with us. (emphasis supplied).

When the petitioner began packing, the officer "leaned in to see what was going on." Mr. Lee then stepped out of the way and the officer stepped into the room. When petitioner finished packing, he walked up to the officer, who was standing in the room near the door, and handed him a crewman's landing permit (Form I-95) without saying a word. No search of petitioner's person or possessions had been made up to this time. The officers did not have a warrant for petitioner's arrest and did not have any knowledge that petitioner was present in the hotel. The officer who arrested petitioner did so because he believed that petitioner might abscond since he had already deserted his ship.

The Board further found that petitioner is a native and citizen of China, who was admitted to the United States as a crewman on February 3, 1968 and remained longer than the period for which he was admitted. Petitioner's

only argument at variance with the foregoing findings of fact is that the officers entered the hotel room without authority and permission prior to the time petitioner was awakened and questioned. The findings of fact are supported by reasonable, substantial and probative evidence on the record considered as a whole and are, therefore, conclusive. 8 U.S.C. §1105(a)(4).

EVI

I

Petitioner's first contention is that the initial questioning was unlawful because it was occasioned solely on account of his race. Title 8, U.S.C. §1357 provides in pertinent part:

> "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant–
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States[.]"

The Board did find that the officer decided to question petitioner concerning his immigration status because he observed that petitioner was Oriental. The Board also found, however, that the officers had just been told by Lee that the Oriental aliens they sought were in an adjacent room (#1409). This information was unverified at the moment the officer asked petitioner about his immigration status. The record also shows that the officers had previously been told by the hotel manager that Lee had registered in room #1409 but had moved to room #1407.

Petitioner's failure to answer in English the officer's first question strongly suggested petitioner did not speak English and was therefore an alien. As the court said in *Cheung Tin Wong v. United States Immigration and*

Naturalization Service, ___ F.2d ___ (D.C. Cir. 1972) (slip op. at 10):

> "It is unlikely that an American citizen of oriental descent would be incapable of speaking English well enough to order a cab for himself. If he were a native Chinese-American presumably the nearly universal requirement for compulsory elementary education would have given him some facility in English; and English literacy is a statutory requirement for becoming a naturalized citizen. 8 U.S.C. §1423 (1970). Circumstances suggesting an inability to speak English were thus sufficient grounds for [the officer's] suspicion that petitioner was an alien, and Section 1357(a)(1) thus empowered him to 'interrogate' petitioner 'as to his right to be or remain in the United States'."

In *Cheung Tim Wong v. United States Immigration and Naturalization Service*, ___ F.2d ___ (D.C. Cir. 1972) (slip op. at 9), the court said:

> "We do not in any way intend to suggest that the appearance of being oriental is in any respect 'suspicious', and we wish to state in unequivocal terms that we could never condone stopping or questioning an individual simply because he looked to be of oriental descent. Nonetheless, we need not be so naive as to blink at the reality of the fact that many of the aliens who illegally enter the United States each year are oriental seamen who desert their ships at such major seaports as New York, Philadelphia, and Baltimore in our geographical area."[1]

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[1] Petitioner has referred to a case in this circuit which mentioned the consideration of race as a factor in making an "investigatory stop" of an automobile. *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971). There, the court noted that two

In *United States v. Mendoza - Torres*, 285 F. Supp. 629, 630 (D. Ariz. 1968), immigration officers in an automobile observed the defendant hitchhiking and suspected he could be an illegal alien. The officers stopped, remained in the automobile, and one officer asked the defendant of he was a Mexican or United States citizen. The defendant responded that he was a Mexican citizen and the officer then asked to see his passport. Defendant replied that he did not have a passport. The officer then got out of the car and arrested the defendant. The court held: "[m]anifestly, the officer was within the area of the performance of his duties in questioning the defendant under the facts here in evidence." *Id.* at 361. In *United States v. Montez - Hernandez*, 291 F. Supp. 712 (E.D. Calif. 1968), two immigration officers stopped an automobile and asked the occupants for "their papers" because two men in the back seat had looked at them with apparent nervousness. The court pointed out that "[d]etecting and apprehending illegal aliens is a specal law enforcement problem" and upheld the officers' actions under §1357(a)(1). And in *United States v. Saldana*, 453 F.2d 352 (10th Cir. 1972) two Border Patrol agents were maintaining traffic surveillance at a turnpike entrance located six to seven hundred miles from the Mexican border. The agents observed a truck with three occupants of Mexican descent stopped at the toll gate. The agents approached

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individuals in the automobile were black men in a predominantly black area, and in a footnote stated that the court attached "no particular significance to this fact . . . but merely point[s] out that it would not be unusual to see black men in a predominantly black area." While this case may suggest that race alone is not a "suspicious circumstance", it does not hold that race is irrelevant in all circumstances.

the truck and asked the driver to pull over. The agents inquired as to the citizenship of the two passengers and were told "Mexico". When the agents asked for immigration papers, they were told by the two that they had "swum the river." The agents then arrested the occupants and subsequently arrested the defendant Saldana, the driver of the truck, for illegally transporting aliens. The court said:

> "Riding with Saldana in plain view of the immigration officers were two persons of obvious Mexican descent of whom the agents desired to make inquiry with reference to their right to be in the United States. Saldana was asked to move his car off the highway while this was done. This was a reasonable and routine discharge of the duties of competent officers and not an infringement of Saladana's rights."
> *Id.* at 354. *Accord, United States v. Grandado*, 453 F.2d 769 (10th Cir. 1972).

It is unnecessary to determine here whether race alone may be a permissible basis for questioning an individual about his immigration status. The above cases as well as common sense show that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status. This court concludes that on the information known and observable to the officers, the questioning of petitioner was within the bounds of 8 U.S.C. §1357(a)(1).

II

Petitioner contends that the initial questioning of him by the officer was unlawful because he was not advised of his right to counsel in violation of §292 of the Immigration and Nationality Act, 8 U.S.C. §1362 and

the Fifth Amendment. Section 1362 is inapplicable because it guarantees the right to counsel only in proceedings before a special inquiry officer or in any appeal proceedings.

Petitioner argues, on the basis of the holding in *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), that he was entitled to be informed of his right to counsel when his questioning had reached the accusatory stage. Only the Seventh Circuit has adopted that rule. In *United States v. Brevik*, 422 F.2d 449 (8th Cir. 1970), the Eighth Circuit said:

> "We held in Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), cert. denied, 394 U.S. 943 . . . (1968), that where an interview is of a non-custodial nature, as was concededly the case here, statements elicited or volunteered at such an interview are not tainted or inadmissible due to failure to give all of the *Miranda* warnings, even where such interview has reached the accusatory stage."
> *Id.* at 450.

There is no material difference between questioning by I.R.S. agents and immigration officers; inquiries by either could lead to civil or criminal proceedings against an individual.

Petitioner next argues that the questioning in his hotel room was "custodial" and therefore the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), required the officers to warn him of his right to counsel. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the court defined custodial interrogation:

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived

of his freedom of action in any significant way." *Id.* at 444 (footnote omitted).[2]

The evidence shows that petitioner was in his hotel room and that the officers were standing outside the room at the time of the questioning. There is no showing that the police restricted the ability of the subject to leave the scene of the questioning. Nor was there testimony that the petitioner apprehended that he was not free to terminate the questioning on his decision to do so. Nor did the officers testify, as they did in *Orozco v. Texas*, 394 U.S. 324 (1969), that the accused was not free to leave or was "under arrest." The questioning here was not intensive. The officer merely asked the petitioner if he had any immigration papers to be in the United States, and when informed that he did not, asked if he entered as a crewman and how long he had been here. Cf. *United States v. Barnes*, 464 F.2d 828 (D.C. Cir. 1972). Moreover, the petitioner fully cooperated in answering the questions. The evidence clearly shows that petitioner's answers were given voluntarily and were not induced by any coercion, fraud or misrepresentation. *See White v. United States*, 395 F.2d 170 (8th Cir. 1968). The court concludes that the very limited questioning of petitioner occurred when he was in familiar surroundings, had not been taken into custody, or otherwise deprived of his freedom of action in any significant way. Therefore, in the circumstances, the officers were not required to warn petitioner of his right to counsel.

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[2] See McCormick on Evidence §152(b), at 327 (2d ed. E. Cleary 1972); *Annot.* 31 A.L.R.3d 565.

III

Petitioner's next contention is that his arrest was in violation of the Fourth Amendment. The Board of Immigration Appeals found:

> "The officer who arrested respondent did so because it was the officer's belief that respondent might abscond since respondent had already deserted his ship."

Title 8, U.S.C. §1357(a)(2) authorizes an immigration officer to:

> "... arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . . ."

Petitioner's answers to the officer's questions clearly gave the officer reason to believe that petitioner was in the United States in violation of law. The officer also reasonably concluded that petitioner was likely to escape before an arrest warrant could be obtained because the officer then knew that petitioner had previously deserted ship in violation of law with the apparent purpose of remaining in the United States when he was not authorized to do so. The petitioner does not point to, nor does the record show, any actions of the officers in this case which violated the Fourth Amendment.

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

SO ORDERED.
Dated: February 28, 1973

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

[May 16, 1972]

File: A17 517 466 - Washington, D.C.

In re: HON-KEUNG *KUNG*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David Carliner, Esq.
932 Pennsylvania Bldg.
Washington, D.C. 20004

ON BEHALF OF I&N SERVICE: Irving A. Appleman
Appellate Trial Attorney

ORAL ARGUMENT: October 12, 1971

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant crewman - remained longer than permitted

Lodged: None

APPLICATION: None

Respondent appeals from the special inquiry officer's order requiring his deportation on the ground stated in the caption. The appeal will be dismissed.

The special inquiry officer found that respondent was a native and citizen of China who was admitted as a crewman on February 3, 1968 and remained longer than the period for which he was admitted. The issue is whether the evidence on which these findings were made was obtained as a result of an illegal arrest, and an illegal search and seizure. The Service presented its case through the testimony of two investigators. The respondent and Mr. Sandy Lee, who was with him at the time of his arrest, also testified on the issue of the arrest. The special inquiry officer discussed all the evidence fully. He held that no matter whose testimony was accepted, there was no evidence that the investigators made a forceful entry.

We find that the Service investigators had a non-verbal permission to enter the room to arrest respondent and that, even if they did not, they were entitled to enter to arrest respondent.

Briefly, the investigators testified that they went to a hotel to speak to Mr. Sandy Lee. They believed he could furnish them with information concerning the whereabouts of deserting Chinese crewmen, Wang and Chang (pp. 11-13, 29). As they approached the room which was their destination, they found the door ajar three or four inches. An investigaror knocked at the door. Mr. Sandy Lee opened it wide. The investigator identified himself. Informed of the investigators' mission, Mr. Lee told them that the aliens they were looking for were in the adjoining room (pp. 14, 18). The investigator, still standing in the doorway, observed the respondent lying in a bed close to the door. Because respondent was an Oriental, the investigator decided to question him concerning his immigration status (pp. 35-37). The questioning brought forth information that respondent had been admitted as a crewman and had overstayed the

period for which he was admitted. The investigator then told respondent to get out of bed, dress, and pack his clothing, because respondent was going to be taken to the immigration office. All this took place while the investigator stood in the doorway. When the respondent started packing, the investigator leaned in to see what was going on, Mr. Lee stepped out of the way and the investigator walked in (p. 20). The investigator waited for respondent to pack (pp. 15-16). When respondent had completed his preparations, he walked up to the investigator who was standing in the room near the door and handed the investigator a crewman's landing permit (Form I-95) without saying a word (pp. 24-25). No search of his possessions or person had been made to this time. The investigators did not have a warrant for respondent's arrest. They had no knowledge that he was present in the hotel (pp. 28-29). The officer who arrested respondent did so because it was the officer's belief that respondent might abscond since respondent had already deserted his ship (pp. 29, 33).

Respondent was taken to the Service office where he was interviewed. The crewman's landing permit was used to question respondent (p. 60). As a result of the questioning, the Service files were obtained. Evidence taken from these files was introduced at the hearing to establish respondent was in the United States illegally.

Respondent stated that the investigator who questioned him was in the room at the time of the questioning (pp. 80, 83) and that he (respondent) produced his landing permit in response to the investigator's request (p. 85). The respondent had reason to believe that the investigator was from the Immigration Service (p. 84). Mr. Sandy Lee's testimony is at such variance with both the respondent's and the Service's witnesses' that we cannot find it reliable.

We believe that the testimony of the Service officers should be accepted. The Service officers were experienced. The officer who made the arrest was able to question respondent without entering the room since respondent's bed was close to the doorway. There was no need for him to enter the room. After the Service officer and Mr. Lee became aware that respondent was illegally in the United States, Mr. Lee's stepping aside to permit the investigator to enter (p. 20) constituted an implied permission for the officer to enter to arrest respondent. Even without the permission, the officer was entitled to enter the room to arrest respondent. He knew respondent was an alien illegally in the United States. He believed that respondent was a person likely to abscond. No closed door was opened. No entrance was forced or compelled. The questioning was only concerning respondent's immigration status, section 287(a), 8 U.S.C. 1357. See *United States v. Alvarado*, 321 F.2d 336 (2 Cir. 1963), cert. denied 375 U.S. 987 (1964).

No search of respondent was made at the time of the arrest. He voluntarily surrendered the crewman's landing permit. On the basis of the information contained in this permit alone, respondent's alienage and illegality of stay could have been established, *Matter of Tang*, Interim Decision 2080 (BIA 1971). The exhibits obtained by the Service could have been obtained solely on the basis of the information there contained.

ORDER: The appeal is dismissed.

Chairman